(12)

No. 87-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE FIRESTONE TIRE & RUBBER CO., *et al.*,

Petitioners,

v.

RICHARD BRUCH, ALBERT SCHADE,
LEONARD A. SMOLINSKI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

CHRISTOPHER G. MACKARONIS
(Counsel of Record)
STEVEN S. ZALEZNICK
CATHY VENTRELL-MONSEES

American Association of Retired Persons
1909 K Street, N.W.
Washington, D.C. 20049

NORMAN P. STEIN
University of Alabama
School of Law
P.O. Box 1435
Tuscaloosa, AL 35487

*Attorneys for Amicus Curiae
American Association of Retired Persons*

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INTEREST OF AMICUS CURIAE

The American Association of Retired Persons is a not-for-profit corporation of more than twenty-nine million persons age fifty or older.[1] AARP is the largest organization of its kind in America. In representing the interests of its members, AARP seeks to promote the independence, dignity, and well-being of older Americans. Millions of AARP members, both working and retired, are covered by employee benefit plans subject to the

[1] The American Association of Retired Persons files this brief *amicus curiae* with the written consents of the parties, which have been filed with the Clerk of the Court.

Employee Retirement Income Security Act of 1974, "ERISA", 29 U.S.C. § 1001 *et seq.* Pension income provided by ERISA-covered plans plays a pivotal role in the retirement income security of Americans. The ability of AARP members and other older persons to understand the plans in which they participate and to successfully prosecute benefit claims through the judicial system may spell the difference between security and dependence, dignity and impoverishment, in their old age.[2]

The issues in the case concern (1) the standard of review applicable to a benefit denial by a plan administrator, and (2) the standing of former employees to pursue remedies when a plan administrator refuses to provide them information to which they are entitled under ERISA. AARP has a substantial interest in the resolution of these issues, each of which has direct and vital bearing on the ability of AARP members and other older Americans to have benefit disputes resolved fairly and in accordance with their written plan documents, as required by ERISA.

SUMMARY OF ARGUMENT

Both the language and the legislative history of ERISA indicate that Congress affirmatively chose to have benefit eligibility determinations reviewed *de novo* by the federal courts. The civil enforcement provisions available to plan participants provide for

[2] Employee pensions provided 16 percent of the income of individuals age 65 and over in 1986. *Aging America, Projections and Trends*, U.S. Department of Health and Human Services 61 (1988). The median income among the retired elderly receiving both social security and employer-sponsored pension benefits was approximately $14,000 in 1984, over double the median of $6,300 for those receiving only social security. See Pension Plans: Many Workers Don't Know When They Can Retire, Hearings Before the House Select Committee on Aging, H.R. Rep. No. 649, 100th Cong., 2d Sess. 24-25 (Statement of Joseph F. Delfico, General Accounting Office).

Nevertheless, an alarming number of employees simply do not understand the terms of their pension plans. The General Accounting Office has estimated that over 70 percent of the 25 million workers in pension plans were mistaken about when they would be eligible for normal retirement benefits. Pension Plans: Many Workers Don't Know When They Can Retire, General Accounting Office, 2 (August 1987). Similarly, approximately 75 percent of workers eligible for early retirement benefits either were unaware of their benefit eligibility or mistaken about their eligibility date. *Id.*

two distinct forms of relief. Equitable relief is available to plan participants under § 502(a)(3) to compel plan administrators to comply with the terms of the plan or with ERISA's fiduciary standards. 29 U.S.C. § 1132(a)(3). In contrast, § 502(a)(1)(B) authorizes the pursuit of contractual claims for legal relief "under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Contractual claims of this kind are reviewed *de novo* by the federal courts.

The presumption of *de novo* review of contractual claims for benefits is buttressed by ERISA's legislative history. The numerous versions of ERISA considered by the Senate and the House contemplated *de novo* review of claims for benefits in the forum of first resort. The only provision providing for deferential review ever considered by Congress during the ERISA legislative process had been contingent upon prior *de novo* review by an arbitrator.

The trust law principles incorporated into ERISA prohibit deference to the decision of a trustee with divided loyalties. Absent clear congressional intent to the contrary, this duty of loyalty would flatly prohibit trustees from exercising discretion in matters in which the trustee has an interest. Thus, under trust principles the decision of a conflicted employer fiduciary to deny benefits cannot be considered a discretionary act subject to deferential review.

Moreover, ERISA's exclusive purpose rule requires that plans be administered for the exclusive purpose of providing benefits to participants and their beneficiaries. The discretionary conduct of plan fiduciaries must advance these purposes. Courts should not accord deference to decisions that deny benefits to participants with no compensating benefit to the plan as a whole. Judicial review of such decisions should be *de novo*.

Finally, the remedial scheme of ERISA contains disclosure requirements designed to ensure that participants, including former employees, have access to benefit information in order to determine their rights under the law. Section 502(c) of ERISA grants standing to participants to seek statutory penalties when they have been denied such information. Nothing in ERISA suggests that the status of participants is contingent upon the plan administrator's determination of benefit eligibility.

ARGUMENT

I. A PARTICIPANT WHO HAS BEEN DENIED BENEFITS UNDER AN ERISA PLAN IS ENTITLED TO *DE NOVO* JUDICIAL REVIEW OF THE BENEFIT ELIGIBILITY DETERMINATION.

The principal issue in this case concerns the appropriate standard of judicial review under ERISA of a plan administrator's determination of benefit claims. Based on ERISA's plain language, its legislative history, and its incorporation of trust law principles, it is clear that Congress intended that such determinations be subject to a *de novo* standard of judicial review.

A. The Language Of ERISA Provides That Participants May Bring A Legal Action For Contractual Benefits Under The Terms Of The Plan Document.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975). The language of ERISA demonstrates that Congress viewed benefit claims as questions of entitlement to "contractually authorized benefits," *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 147 (1985), to be reviewed *de novo* by the courts.

Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), provides that a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan." The plan itself must be "established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), which must "specify the basis on which payments are made...from the plan," 29 U.S.C. § 1102(b)(4). These provisions spell out a statutory scheme under which a participant's entitlement to benefits must originate from a written plan—the contract—and under which a participant may bring a civil action to compel payment of such benefits.

In contrast to the provision authorizing a participant to bring a civil action to recover benefits due under a plan, § 502(a)(3) authorizes a participant to bring an action for "appropriate equitable relief...to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). The juxtaposition of these two enforcement provisions leads inescapably to the conclusion that Congress contemplated two distinct actions by plan participants—equitable actions to enforce ERISA's fiduciary requirements, and contractual actions to recover benefits owed under the terms of the plan.[3]

If a challenge to a benefit denial is a challenge to a discretionary act by a fiduciary, as Firestone contends, civil actions for denial of benefits would logically fall under § 502(a)(3). If this were correct, however, § 502(a)(1)(B) would be superfluous. Such an interpretation is plainly contrary to the well settled principle of statutory construction that courts should "...give effect to [the] plain language [of ERISA] unless there is good reason to believe that Congress intended to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983). *See also United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute.")

B. The Legislative History Of ERISA Reveals That Congress Intended *De Novo* Review Of Benefit Eligibility Determinations.

Every bill considered by the House or the Senate during the ERISA legislative process contemplated *de novo* review of benefit

[3] This dispute arises in large measure because Firestone, in drafting its termination pay plan, failed to define so basic a term as "reduction in force." Firestone's argument that courts should defer to fiduciary interpretation of plan language would encourage employers to draft similarly vague plans, thereby increasing the need for plan fiduciaries to "interpret" plan language. Such a result would be inconsistent not only with the intent of Congress to require written plans, but also with congressional intent to disclose plan information that enables employees to understand their rights and obligations under a plan. *See, e.g.*, Conference Report on H.R. 2, Pension Reform, Rep. No. 1280, 93d Cong., 2d Sess. 297, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., III Legislative History of the Employee Retirement Income Security Act of 1974, 4564 (Comm. Print) (hereafter "Legislative History") ("A written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan.").

determinations in the forum of first resort. Indeed, the only provision that Congress considered that provided for deferential judicial review had been contingent upon prior *de novo* review by an arbitrator. When the concept of arbitration was rejected by Congress, so too was the correlative provision for deferential review of the arbitrator's decision. In light of this legislative history, it is clear that Congress intended courts to review benefit determinations *de novo*.

The House and Senate sent two competing versions of pension reform to Conference.[4] Among the differences between the House and Senate bills were provisions for resolving benefit disputes. The House bill authorized a participant to bring a civil action "to recover benefits due him under the terms of his plan..." H.R. 2 in the House, 93d Cong., 2d Sess., § 503(e)(1)(B) (1974), *reprinted in* III Legislative History 3898, 4045.

The Senate bill was more detailed. It first included a provision requiring every plan to provide "a procedure for the fair and just review" by the administrator of "any dispute between the administrator of the plan and any participant or beneficiary...." H.R. 2 in the Senate, 93d Cong., 2d Sess., § 691(a)(1), 120 Cong. Rec. 4977 (1974), *reprinted in* III Legislative History 3599, 3813. Following internal review, a disappointed participant could (1) bring a civil action "for appropriate relief, legal or equitable," *id.*, §§ 691(b), 693, or (2) take the dispute to arbitration. *Id.*, § 691(a)(2). Even Petitioner concedes that these first stages of review were to be conducted *de novo*.[5] The Senate bill further provided that the plan would bear the costs of arbitration. *Id.*, § 691(e). The bill also provided for judicial review of an arbitrator's decision under the deferential standards of § 301 of the Labor Management Relations Act ("Taft-Hartley"). *Id.*, § 691(d). *See*,

[4] *See* Staff of Comm. of House and Senate Conferees, Summary of Differences Between the Senate Version and House Version of H.R. 2 to Provide for Pension Reform, Part III, *reprinted in* III Legislative History 5249.

[5] Firestone noted that the Senate version of ERISA would have taken "claims authority away from fiduciaries." Brief of Petitioner at 16.

e.g., Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe R. R., 768 F.2d 914, 921 (7th Cir. 1985).

The House conferees opposed the arbitration requirement "on grounds it might be too costly to plans and a stimulant to frivolous benefit disputes." 120 Cong. Rec. 29,941 (1974), *reprinted in* III Legislative History 4769 (comments of Senator Jacob Javits).[6] The Senate conferees yielded to this concern, agreeing to delete the arbitration provisions. The remaining structure of the Senate bill for benefit disputes—an internal review of a benefit denial followed by a civil action to recover benefits[7]—was retained. Not a word in the legislative history mentions or gives any reason to infer deferential review in such civil actions.

Firestone nevertheless argues that Congress intended deferential review because § 402(a)(2) of ERISA, 29 U.S.C. § 1102(a)(2), incorporates language from the House bill that requires every plan to "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." Brief of Petitioner at 16. Firestone's argument in a nutshell is that Congress rejected ar-

[6] Firestone misinterprets the legislative history when it says that the House was concerned about the cost of deferential review rather than the costs of arbitration. Brief of Petitioner at 16. Firestone implies that a *de novo* standard of review would encourage frivolous lawsuits. This is incorrect. A former employee suing for benefits must hire an attorney to file a lawsuit. While ERISA has a provision for attorneys' fees, the plaintiff will have to bear the expense of the case if the suit is unsuccessful. Moreover, courts have discretion to deny attorneys' fees even to a prevailing plaintiff, *see Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980), and may even assess attorneys' fees against a plaintiff who brings a frivolous lawsuit. 29 U.S.C. § 1132(g)(1). These facts make it unlikely that frivolous cases will be filed, regardless of the standard by which the plan's decisions are to be judged.

[7] The Senate bill included a single section authorizing participants to bring civil actions, "both equitable and legal." H.R. 2 in the Senate, 93d Cong., 2d Sess. § 693, *reprinted in* III Legislative History 3599, 3816. The Conference substitute separated the Senate's single provision into two separate sections, one authorizing equitable actions to redress fiduciary misconduct, and one authorizing legal actions to recover benefits under the plan, as the House had provided.

bitration and *de novo* judicial review in favor of a grant of discretionary authority to the named fiduciary: "Congress made an explicit decision to give fiduciaries the discretion to decide benefits claims and rejected attempts to take claims authority away from fiduciaries." Brief of Petitioner at 16.

There is absolutely nothing in the legislative history, however, that ties the standard of review to the requirement that a plan have a named fiduciary.[8] ERISA's legislative history states that the named fiduciary "is required so the employees may know who is responsible for operating the plan."[9] Thus, contrary to Firestone's assertion, § 402(a)(1) was not a grant of authority to named fiduciaries but a *disclosure* requirement.

If Congress had intended to provide for deferential judicial review of benefit denials, it would have said so. The Senate, in its proposed version of ERISA, had no difficulty in providing for deferential review of an arbitrator's decision. In other contexts, Congress has demonstrated its capability of formulating language to provide for deferential review. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(a). Congress simply did not provide for deferential review of benefit denials under ERISA and such review cannot fairly be implied. Accordingly, ERISA should be read in accordance with its plain meaning, that participants' contractual claims to recover benefits due them under the written plan should be reviewed *de novo* by the courts.[10]

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[8] A detailed "comparative analysis of the Senate-passed and House-passed versions of" ERISA prepared by the Congressional Research Service failed to even mention the language that became § 402 of ERISA. *See* 120 Cong. Rec. 4251 (1974), *reprinted in* III Legislative History 4252.

[9] H. Conf. Rep. 1280, 93d Cong., 2d Sess. 297, *reprinted in* III Legislative History 4564.

[10] The notion of employee plans as establishing contractual entitlement is not novel to ERISA. Prior to ERISA, the modern judicial trend had been to regard an employee's rights under an employee benefit plan "as a conditional contract right," *Gitelson v. Du Pont*, 17 N.Y.2d 46, 268 N.Y.S.2d 11, 215 N.E.2d 336, 338 (1966), rather than "a mere gratuity, to be bestowed upon such objects of the donor's bounty." *Russell v. Princeton Laboratories, Inc.*, 50 N.J. 30, 231 A.2d 800 (1967). *See generally*, Note, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. Chi. L. Rev. 96 (1955).

C. Trust Law Calls For *De Novo* Review Of Benefit Decisions By Plan Administrators Who Have Interests In Conflict With Those Of The Plan's Participants.

Two competing versions of ERISA's standard of judicial review are urged upon this Court, an arbitrary and capricious standard and a standard of *de novo* review. In cases where a plan administrator's interest conflicts with those of plan participants, only the latter standard is consistent with the trust duty of loyalty which Congress made the foundation of ERISA's fiduciary provisions.

The duty of loyalty is "the most fundamental duty owed by the trustee to the beneficiaries of a trust." III Fratcher, Scott on Trusts § 170 (4th ed. 1988). Ordinarily the duty of loyalty does not permit fiduciaries to exercise discretion in a matter in which the fiduciary has an interest.[11] *See generally Woods v. City National Bank & Trust Co.*, 312 U.S. 262, 269 (1941); *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). Yet Firestone argues that ERISA should be interpreted in a manner that permits a fiduciary to exercise discretion in a decision that pits the fiduciary's interests in avoiding benefit payments against the participants' interest in receiving them.

Firestone's argument, taken to its logical conclusion, is that Congress intended to undermine the duty of loyalty as applied to employer fiduciaries making benefit decisions.[12] The only

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[11] Courts have held that trustees with an interest in conflict with trust beneficiaries must either resign their position, *e.g.*, *Fidelity Union Trust Co. v. Johnson*, 140 N.J. Eq. 548, 55 A.2d 813 (1947), or petition the court to make decisions on matters in which the trustees have conflicting interests. *See, e.g.*, *Rogers v. Rogers*, 111 N.Y. 228, 18 N.E. 636 (1988); *Armington v. Meyer*, 103 R.I. 211, 236 A.2d 450 (1967).

[12] Brief of Petitioner at 29. Firestone contends that trust law principles require courts to defer to a fiduciary's decisions "even when the fiduciary has a conflict." Brief of Petitioner at 28. In Firestone's view, the conflict is only one of many factors to be considered by a court. *Id.* In fact, courts will not permit a trustee with a conflict of interest to take discretionary action unless it is clear that the settlor *intended* the trustee to act despite the conflict. *See* III Fratcher, Scott on Trusts, 187.5 n.5 (cases cited hold that trustee may act despite conflict of interest only if settlor authorized the trustee to act despite the conflict).

evidence that Firestone points to in support of this novel assertion is that ERISA permits employees of the employer to serve as plan fiduciaries without causing a *per se* violation of ERISA's prohibited transaction rules. *See* 29 U.S.C. § 1108(c)(3). That section alone is hardly sufficient evidence of congressional intent to waive the duty of loyalty, for in such situations, courts:

> adhere to the rule of strict construction in favor of the trust...The presumption of the law is against [power to act despite a conflict of interest] and, in the absence of clear provision to the contrary, all doubts regarding the scope of the language upon which the claim for such a power is made must be resolved against the party making the claim.

City Bank Farmers Trust Co. v. Taylor, 76 R.I. 129, 69 A.2d 234 (1949); *see also* Retirement Income Security Act of 1973, S. Rep. No. 127, 93d Cong., 1st Sess. 29, *reprinted in* I Legislative History 587, 615 (indicating that Congress codified certain trust principles because, *inter alia*, it wished to prevent settlors from exempting fiduciaries from common law trust duties as they had been permitted to do under state law).

Given the lack of clear congressional intent to override the strictures of the duty of loyalty, ERISA should be interpreted in a manner that precludes fiduciaries from exercising discretion on matters affecting their own interests. Accordingly, when plan fiduciaries make decisions affecting their interests, courts must apply a *de novo* standard of review. Any other interpretation of ERISA threatens participant security in the benefits ERISA was enacted to preserve and protect.

D. The Taft-Hartley Standard Of Review Is Inapplicable To ERISA Benefit Plans.

Several courts of appeals have concluded that the arbitrary and capricious standard developed under Taft-Hartley is applicable to ERISA. *See, e.g., Palino v. Casey*, 664 F.2d 854, 858 (1st Cir. 1981); *Bayles v. Central States, Southeast and Southwest Pension Fund*, 602 F.2d 97, 99-100 (5th Cir. 1979). These courts,

however, have reached their conclusion "without any discussion of the differences between LMRA and ERISA." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 143 (3d Cir. 1987).

There are four significant differences between Taft-Hartley and ERISA that make the Taft-Hartley standard of review inappropriate under ERISA.

First, Taft-Hartley did not include, as ERISA does, any provision authorizing participant suits for benefits. In contrast, ERISA specifically provides jurisdiction authorizing participants to bring civil actions to recover benefits under the terms of the plan (and not only to remedy a breach of the exclusive purpose rule, 29 U.S.C. § 1104(a)(1)(A)). This very different statutory structure alone indicates that Congress was not simply extending judicially developed Taft-Hartley benefit dispute principles to other types of employee benefit plans covered by ERISA.

Second, Taft-Hartley is administered jointly by representatives of employees and employers. 29 U.S.C. § 186(c)(5)(B). In the view of the Seventh Circuit[13] and the Third Circuit, this structural requirement "assured that the plan administrator will be neutral," and thus "it is easy to understand why the courts adopted this rule for judicial review of decisions made in the administration of an LMRA plan." *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d at 144.

In many ERISA plans, however, the employer has "the whip hand," *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048, 1052 (7th Cir. 1988), and there can be "no assurance of the trustee's impartiality [since] every dollar provided in benefits is a dollar spent by...the employer; and every dollar saved by the administrator on behalf of his employer is a dollar in [the employer's] pocket." *Bruch*, 828 F.2d at 144.

Third, Taft-Hartley benefit determinations often allocated scarce resources among competing potential beneficiaries, which is necessarily a fiduciary function. Courts have observed of Taft-Hartley that "we review for arbitrariness in the light of the trustees'

[13] *Van Boxel v. Journal Co. Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1988).

responsibility to all potential beneficiaries," *Rueda v. Seafarers International Union of North America*, 576 F.2d 939, 942 (1st Cir. 1978), and that the function of Taft-Hartley trustees "is to preserve the vitality of the fund and to effectively apply its worth to the benefit of as many intended employees as is economically possible." *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969).

In contrast to Taft-Hartley trustees, fiduciaries under ERISA are sometimes called upon to determine whether the employer should have to apply corporate resources to pay benefits to employees. This was the situation confronting the Firestone administrator of the unfunded termination pay plan here in issue. Under these circumstances, the plan fiduciary is not exercising his discretion on how best to preserve the vitality of the fund and to effectively apply its worth to the benefit of as many intended employees as is economically possible.

Fourth, Taft-Hartley trustees were often given discretionary authority not only to apply rules made by the settlor but to make rules.[14] In effect, Taft-Hartley trustees often were called upon to perform "settlor" functions. The promulgation of coverage and eligibility rules is a discretionary act to which courts must necessarily accord deference. The function of ERISA fiduciaries, however, is to apply rules already adopted and communicated to the employees. There is no reason to limit judicial review of the application of such rules.

E. The Exclusive Purpose Rule Requires *De Novo* Review Of Benefit Denials.

ERISA's exclusive purpose rule requires fiduciaries to administer ERISA plans for the exclusive purpose of providing

[14] *See, e.g., Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969) (rule adopted by trustees of UMWA Welfare and Retirement Funds denying benefit credit for periods in which miners were connected with the ownership of a mine); *Roark v. Boyle*, 439 F.2d 497 (D.C. Cir. 1970) (rule denying pensions to miners unless their last year of employment before retirement was served with a union employer); *Toensing v. Brown*, 374 F. Supp. 191 (N.D. Cal. 1974), *aff'd*, 528 F.2d 69 (9th Cir. 1985) (rule increasing pensions to carpenters who retired after June 30, 1971 more than pensions to carpenters who retired on or before that date).

benefits to participants and their beneficiaries. 29 U.S.C. § 1104(a)(1)(A)(i). A fiduciary's discretionary act must promote this purpose and no other. A decision to deny benefits to participants does not advance the purpose of providing benefits to participants unless there is a compensating advantage to the plan.[15] A decision to deny benefits in an unfunded plan provides no such compensating advantage and therefore falls outside the range of permissible discretionary acts under the exclusive purpose rule. Thus, courts should the benefit dispute as a contractual question subject to *de novo* review.

The facts in this case illustrate the need for *de novo* review. The two affidavits of Thomas E. Robinson, Director of Compensation and Management Development for Firestone, indicate that the only guideposts he used in interpreting the plan were Firestone's goals, intentions, and purposes.[16] Conspicuously absent from the factors considered by Mr. Robinson were the expectations and understandings of Firestone's former employees about the plan, the likelihood that the former employees would lose their jobs after the sale of the division, the existence or nonexistence of a comparable termination pay plan by the purchaser

[15] Pre-ERISA cases often held that pension plans should be construed in favor of the employees. *See, e.g., Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1354 (8th Cir. 1980); *Thornberry v. MGS Co.*, 46 Wis.2d 592, 176 N.W.2d 355, 360 (1970).

[16] The affidavits indicate that Mr. Robinson interpreted the plan to conform to Firestone's "basic termination pay policies and its RIF pay policies" (JA 119), which, to the limited extent they were expressed in writing, appeared only in a manual that "has always been deemed confidential." (JA 121) These goals apparently included avoiding "unfairness" to the employees, (JA 124) and they sometimes resulted in paying benefits when Firestone sold a division as an ongoing business but other times did not. (JA 121-22) Although nowhere articulated in the personnel manual, Firestone claims that an important consideration in deciding when employees of such divisions are entitled to termination pay is Firestone's subjective assessment of the comparability of benefits offered by Firestone and those offered by the new owner of the division. (JA 121-22) Mr. Robinson, the Firestone employee responsible for interpreting the termination pay plan, did not, however, actually compare benefits, but relied upon discussions with people he believed to be "knowledgeable" about benefit levels at Firestone and Occidental, the new owner. (JA 125)

of the division, and the fact that important aspects of the termination plan had never been committed to writing and in any event never communicated to the employees. In short, Mr. Robinson interpreted the plan for the exclusive purpose of conforming the plan to Firestone's often unstated policies, rather than for the exclusive purpose of providing benefits for the supposed beneficiaries of the plan. As a result, Mr. Robinson appropriated for Firestone's sole benefit this unfunded plan's sole asset—Firestone's promise to provide termination pay, a promise that Firestone's employees had earned with their labor no less than if the plan had been funded. Firestone's former employees are entitled to have the meaning of that promise determined *de novo*.

II. THE COURT OF APPEALS CORRECTLY RULED THAT FORMER EMPLOYEES HAVE STANDING TO SEEK RELIEF UNDER ERISA SECTION 502(c).

The court of appeals held that former employees have standing to pursue claims under § 502(c) when they are denied information about their plan and benefits.[17] The plain language of the statutory definition of participant supports the Third Circuit's holding.

ERISA defines participant to include "any...former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). In determining whether former employees are participants, the issue is the meaning that should be given to the phrase "may become eligible." The court of appeals held that the phrase refers to an "employee or former employee who claims to be a participant or beneficiary." *Bruch*, 828 F.2d at 153. Two other courts of appeals have suggested that the term refers to former employees with colorable claims for benefits. *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

[17] Section 104(b)(4) of ERISA provides that participants and beneficiaries of any ERISA plan have a right to request documents concerning their plan. Section 105 of ERISA provides that participants and beneficiaries of an ERISA pension plan may request a statement describing the benefits they have earned to date. 29 U.S.C. § 1025. Under § 502(c), a plan administrator who fails to supply requested documents or a requested benefit statement is subject to a maximum $100 per day penalty, subject to the discretion of the federal district court. 29 U.S.C. § 1132(c).

Firestone rejects both of these approaches and contends instead that the phrase "may become eligible" refers not to the possibility that a claimant may prevail in his suit for benefits, but rather to an employee's or former employee's "ability to fulfill the plan's eligibility criteria at some time in the future" as determined by the plan administrator.[18] Brief of Petitioner at 35.

Denying participant status to former employees who claim to be participants is entirely incompatible with certain ERISA provisions that refer to "participants." As the Third Circuit recognized, such a restrictive definition of participant would mean that former employees would be unable to bring civil actions under

[18] Although the Fifth Circuit Court of Appeals appeared to have adopted this approach in *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980), a subsequent Fifth Circuit case, *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), recognizes that courts should not foreclose former employees' rights to information. In *Paris*, former employees requested documents under § 104(b)(4) of ERISA. The administrator failed to provide the documents and the employees sued for damages under § 502(c). The Fifth Circuit observed:

> The short answer may be that since the plaintiffs were not participants they were not entitled to any information. However, at the time of this request their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement. The decision to grant relief under 29 U.S.C. § 1132(c) is committed to the discretion of the trial judge. We take his disposition of this case as a decision not to grant relief. The plaintiffs have not attempted to demonstrate that they were prejudiced by the alleged failure to respond, and we cannot say that the district court abused its discretion.

Paris, 637 F.2d at 362. In light of *Paris*, the Fifth Circuit's position appears to be that former employees have standing under § 502(c) for damages unless, as in *Nugent*, the employee admits that she has no present colorable claim to benefits.

of the division, and the fact that important aspects of the termination plan had never been committed to writing and in any event never communicated to the employees. In short, Mr. Robinson interpreted the plan for the exclusive purpose of conforming the plan to Firestone's often unstated policies, rather than for the exclusive purpose of providing benefits for the supposed beneficiaries of the plan. As a result, Mr. Robinson appropriated for Firestone's sole benefit this unfunded plan's sole asset—Firestone's promise to provide termination pay, a promise that Firestone's employees had earned with their labor no less than if the plan had been funded. Firestone's former employees are entitled to have the meaning of that promise determined *de novo*.

II. THE COURT OF APPEALS CORRECTLY RULED THAT FORMER EMPLOYEES HAVE STANDING TO SEEK RELIEF UNDER ERISA SECTION 502(c).

The court of appeals held that former employees have standing to pursue claims under § 502(c) when they are denied information about their plan and benefits.[17] The plain language of the statutory definition of participant supports the Third Circuit's holding.

ERISA defines participant to include "any...former employee of an employer...who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). In determining whether former employees are participants, the issue is the meaning that should be given to the phrase "may become eligible." The court of appeals held that the phrase refers to an "employee or former employee who claims to be a participant or beneficiary." *Bruch*, 828 F.2d at 153. Two other courts of appeals have suggested that the term refers to former employees with colorable claims for benefits. *Weiss v. Sheet Metal Workers Local 544 Pension Trust*, 719 F.2d 302, 303 (9th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984); *Saladino v. ILGWU National Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

[17] Section 104(b)(4) of ERISA provides that participants and beneficiaries of any ERISA plan have a right to request documents concerning their plan. Section 105 of ERISA provides that participants and beneficiaries of an ERISA pension plan may request a statement describing the benefits they have earned to date. 29 U.S.C. § 1025. Under § 502(c), a plan administrator who fails to supply requested documents or a requested benefit statement is subject to a maximum $100 per day penalty, subject to the discretion of the federal district court. 29 U.S.C. § 1132(c).

Firestone rejects both of these approaches and contends instead that the phrase "may become eligible" refers not to the possibility that a claimant may prevail in his suit for benefits, but rather to an employee's or former employee's "ability to fulfill the plan's eligibility criteria at some time in the future" as determined by the plan administrator.[18] Brief of Petitioner at 35.

Denying participant status to former employees who claim to be participants is entirely incompatible with certain ERISA provisions that refer to "participants." As the Third Circuit recognized, such a restrictive definition of participant would mean that former employees would be unable to bring civil actions under

[18] Although the Fifth Circuit Court of Appeals appeared to have adopted this approach in *Nugent v. Jesuit High School*, 625 F.2d 1285 (5th Cir. 1980), a subsequent Fifth Circuit case, *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981), recognizes that courts should not foreclose former employees' rights to information. In *Paris*, former employees requested documents under § 104(b)(4) of ERISA. The administrator failed to provide the documents and the employees sued for damages under § 502(c). The Fifth Circuit observed:

> The short answer may be that since the plaintiffs were not participants they were not entitled to any information. However, at the time of this request their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement. The decision to grant relief under 29 U.S.C. § 1132(c) is committed to the discretion of the trial judge. We take his disposition of this case as a decision not to grant relief. The plaintiffs have not attempted to demonstrate that they were prejudiced by the alleged failure to respond, and we cannot say that the district court abused its discretion.

Paris, 637 F.2d at 362. In light of *Paris*, the Fifth Circuit's position appears to be that former employees have standing under § 502(c) for damages unless, as in *Nugent*, the employee admits that she has no present colorable claim to benefits.

Section 502(a) of ERISA, 29 U.S.C. § 1132(a), which authorizes actions by "participants and beneficiaries."[19] *Bruch*, 828 F.2d at 152.

An even more telling example is Section 503 of ERISA, 29 U.S.C. § 1133, which provides that:

> every employee benefit plan shall—(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant and (2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review of the decision denying the claim.

If Firestone's interpretation of the term "participant" applied to Section 503, it would yield the paradoxical result that the only individuals who are entitled to receive detailed written notices of benefit denials are those whose benefits are granted; and the only individuals who are entitled to a full and fair review of a claims denial are those whose claims were not denied. For purposes of Section 503 of ERISA, the term participant includes former employees who claim entitlement to benefits, the definition adopted by the Third Circuit.

The legislative history also supports a definition of participant that enhances the ability of individuals to obtain information about their benefits. One reason Congress mandated disclosure was so "that individual participants and beneficiaries will be armed with enough information to enforce their own rights." S. Rep. 127, 93d Cong., 1st Sess. 27, *reprinted in* I Legislative History 587,

[19] Firestone argues that an individual lacks standing *ab initio* to bring an action to recover benefits if the court ultimately determines he is not eligible for benefits. Brief of Petitioner at 43. This interpretation improperly lumps together the determination of standing and a determination of the merits. The inquiries of standing and entitlement to benefits must be separate, since standing does not depend on the merits of the case. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975).

613. The Third Circuit correctly observed that this "function can be performed only if all people with potential rights can obtain information." *Bruch*, 828 F.2d at 153.

Moreover, the burden on plans to supply information to former employees who request it is quite small. First, the plan incurs no cost to identify participants, since they have identified themselves. Second, "[t]he administrator may make a reasonable charge to cover the cost of furnishing such complete copies" of documents to participants. 29 U.S.C. § 1024(b)(4). Third, as Firestone concedes, employers as a general matter do comply with requests for information "because of the constraints of ERISA and also because it makes good sense from an employee relations standpoint to do so." Brief of Petitioner at 41. Finally, there is simply no reason to believe that legions of former employees with no rights to benefits will suddenly descend upon plan administrators with unreasonable requests for documents and benefit statements.

Firestone nonetheless argues that the definition of "participant" set forth by the Third Circuit will subject plans to administrative nightmare and such great expense that "amounts available to actual beneficiaries of the plan" will have to be reduced. Brief of Petitioner at 41. Firestone is apparently referring not only to ERISA rules requiring plans to respond to participant requests for either documents or benefit statements, but to the ERISA disclosure provisions requiring a plan to provide certain documents to all participants and beneficiaries on the plan's own initiative. *See* Brief of Petitioner at 41.

Firestone's fears are unwarranted. The definition of the term "participant" can take account of Firestone's concerns by focusing on who has the burden of initiating action under each ERISA section in which the term appears. In sections that place the burden of initiating action on the participant, the former employee makes the determination of whether he might become entitled to benefits. Thus, in this case, the former Firestone employees who sought information made the determination that they might become eligible for benefits and were thus participants for purposes of § 502(c). In sections that place the burden of initiating action on the plan (for example, § 104(b)(3) of ERISA, which

requires the plan administrator annually to provide plan participants with certain schedules and reports, 29 U.S.C. § 1004(b)(3)), the plan administrator makes the determination of who might become eligible for benefits and is thus a participant. This approach avoids the concerns of Firestone and amici curiae concerning administrative burdens on the plan and at the same time permits effectuation of congressional intent to permit former employees to obtain plan information to assist them in determining whether to pursue a claim for benefits.[20]

[20] A similar approach may in fact be mandated by § 101(a) of ERISA, 29 U.S.C. § 1001(a). This section provides that the disclosures required by §§ 102(a)(1), 104(b)(3), 105(a) and (c), must be made to "participants covered under the plan and to each beneficiary who is receiving benefits under the plan." This suggests that there is another class of participants (not covered under the plan) and beneficiaries (not receiving benefits under the plan) who are entitled to information under other ERISA disclosure provisions, *i.e.*, §§ 104(b)(2) and 104(b)(4). This construction of the statute differs from the textual argument with respect to the availability of benefit statements to former employees who are not covered by the plan. As a practical matter, however, such former employees can obtain a near equivalent to such benefit statements by filing a claim for benefits under § 503 of ERISA, 29 U.S.C. § 1133, which requires the plan to provide the former employees with a statement explaining the reason for the plan's denial of benefits.

CONCLUSION

For the foregoing reasons, the Court should hold that participants are entitled to *de novo* review of benefit determinations under ERISA. The Court should further hold that a former employee is a participant under ERISA for purposes of requesting information regarding the plan and benefit eligibility.

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Respectfully submitted,

Christopher G. Mackaronis
(Counsel of Record)
Steven S. Zaleznick
Cathy Ventrell-Monsees
AMERICAN ASSOCIATION OF
RETIRED PERSONS
1909 K Street, N.W.
Washington, D.C. 20049

Norman P. Stein
University of Alabama
School of Law
P.O. Box 1435
Tuscaloosa, AL 35487

ATTORNEYS FOR AMICUS CURIAE
AMERICAN ASSOCIATION OF
RETIRED PERSONS